DEC 7
JOHN T. FEY,

Supreme Court of the United States

OCTOBER TERM, 1956

No. 614

LEROY STANLEY, CHARLIE WATTS WORRELL, JR., and BEN JACKSON, JR., PETITIONERS,

versus

UNITED STATES OF AMERICA, RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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versus

UNITED STATES OF AMERICA, RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners pray that a Writ of Certiorari issued to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case of November 8, 1956.

OPINIONS BELOW

The sentences imposed by the District Court (App. 13), are unreported. The opinion of the Court of Appeals (App. 14) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1956. (App. 15.) The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Sections 1254, 26 U. S. C., Sections 2803, 2810, 2833, 2913, 3115, 3116, 3253, 3321, and 18 U. S. C., Section 371.

QUESTION PRESENTED

Whether a co-conspirator can be cross examined with reference to an alleged confession made long after the conspiracy terminated and whether the alleged confession can be introduced in evidence, without instruction by the Court at the time of the cross examination and without proper instructions at the time of the introduction of the confession, that the statement could not be considered as evidence against co-defendants, but against declarent only.

STATEMENT

The Petitioners, Stanley, Worrell and Jackson, along with eight other defendants, were indicted for a conspiracy to violate certain provisions of the Internal Revenue Code and for substantive violations of the Code with reference to the manufacture, concealment, transportation and sale of non-tax paid whiskey. All of the defendants, with the exception of the Petitioners and one Milton Mack, either before or during the trial had plead guilty to the substantive acts, so that the case proceeded against the Petitioners and Milton Mack only.

The conspiracy was alleged to have begun some time in December of 1951 and terminated in January of 1953. As a part of its case in chief, the government attempted to introduce an alleged confession of Milton Mack, made to two of its agents in December of 1953, which statement involved each of the petitioners herein. Upon objection by defense attorneys, the introduction of the statement at

that time was ruled out. With the exception of Counts 9 and 10 of the indictment, which involved the incident of January 20, 1952, to both of which Stanley later admitted guilt, and Jackson to Count 9 only, this alleged confession constituted practically the only evidence either of a conspiracy or of substantive violations of the Code by the Petitioners.

After Milton Mack had testified on direct examination in his own defense, the Assistant District Attorney proceeded to cross examine him by reading from his purported confession and asking him line by line whether or not he had made such a statement, which he in each instance, insofar as the Petitioners are concerned, denied.

This was done over objection of defense attorneys, on the ground that the District Attorney was attempting to do by indirection what he could not do directly, and the Court was asked at that time to instruct the jury then that such evidence could be considered as against the witness only, but the Court refused to do so.

Again, at the close of the case, the government was permitted to introduce in evidence the purported confession of Milton Mack, without instruction from the Court that it could be considered against him only. The trial Judge in general charge also omitted such an instruction, and it was only at the very end of the case that he told the jury in general terms, and not specifically as requested by defense attorneys, that the confession and evidence could not be considered against the co-defendants. (App. 20.)

The jury found the Petitioners guilty of conspiracy, as well as various substantive acts, though all the testimony bearing on conspiracy was contained in the alleged confession of Milton Mack. Particularly is this true of the defendant Worrell, who did not admit involvement in any of the violations.

The Court sentenced Jackson to imprisonment for fifteen months and a fine of one hundred dollars, under the conspiracy count, and to imprisonment for fifteen months and a fine of one hundred dollars under counts 2, 3, 4 and 9, to commence at the expiration of the first sentence, but to stand suspended, and placed him on probation as to the second sentence for a period of four years.

The Court sentenced Stanley to a period of two and one-half years imprisonment and a fine of five hundred dollars on the first count, and to a term of imprisonment of two years and a fine of two hundred dollars, on counts 2, 3, 4, 5 and 9, to start at the expiration of the sentence on count 1, but suspended the second sentence and placed him on probation for a period of five years.

As to Worrell, the Court sentenced him to imprisonment for a term of two years and a fine of five hundred dollars on the first count, and to imprisonment for eighteen months and a fine of two hundred dollars on counts, 1, 3 and 4, to commence to run at the expiration of the first sentence, but to be suspended, and he was placed on probation for a period of five years.

The Petitioners appealed to the Court of Appeals for the Fourth Circuit, upon various grounds, the main one being, however, that the District Court committed error in refusing to instruct the jury at the time that Milton Mack was testifying and at the time that the government introduced his alleged confession, that such evidence could not be considered as evidence against the Petitioners here. The Court of Appeals affirmed the judgment of the District Court.

ARGUMENT

This Court has on numerous occasions stated, and it is too well settled to require argument, that a statement made by a conspirator implicating others after the end of the alleged conspiracy is not admissible as evidence against a co-conspirator. *Brown v. United States,* 150 U. S. 93 37 L. Ed. 1010; *Fiswick v. United States,* 329 U. S. 211, 91 L. Ed. 196; *Logan v. United States,* 144 U. S. 363, 36 L. Ed. 477; *Lutwak v. United States,* 344 U. S. 604, 97 L. Ed. 593.

The question before the Court at this time is whether or not a statement made by an alleged co-conspirator after the termination of the conspiracy is properly admissible in evidence, when the statement strongly implicates other defendants against whom it is incompetent, and if so, under what conditions, or phrasing the question in another way, are there exceptions to the above-stated rule of law, and if so, what are these exceptions and under what circumstances do they apply?

It is conceded that for the purpose of impeachment that statement of Milton Mack is admissible, and we agree with the language of the Fourth Circuit Court of Appeals when it said "—that Milton's statement was, in addition, competent proof as to the truth of his alleged criminal conduct, likewise is plain, for he was a defendant as well as a witness and this was his confession. These purposes entitled the statements to admission in evidence, notwithstanding that the other defendants were detrimentally mentioned in the statements." However, it is of interest to note at this point that not once did the government contend that Milton Mack's statement was a confession.

While the Courts have held that such a statement is admissible they have limited its effect as against the declarant only. This Court in *Lutwak v. United States,* 344 U. S.

604, 97 L. Ed. 593 was confronted with a similar set of facts as in this case. In that case this Court said:

> "Relevant declarations or admissions of a conspiracy made in the absence of the co-conspirator, and not in furtherance of the conspiracy may be admissible in a trail for conspiracy as against the declarant to prove declarant's participation therein. The Court **must be careful at the time of the admission** and by its instruction to make it clear that the evidence is limited as against the declarant only. Therefore, when the Trial Court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the deconspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch v. United States,* 336 U. S. 440, 93 L. Ed. 790. Such declaration is inadmissible as to all but the declarant."

The case at hand comes squarely under the above-stated rule of law. The government having failed in its initial effort to introduce the statement of Milton Mack, proceeded to cross-examine the declarant concerning the statement, reading it line by line, and upon objection by petitioner's counsel the Court overruled him and permitted the government to proceed without instructions. It was not until long after the statement had been admitted in this fashion that the Trial Court then gave a general admonition to the jury at the time the statement was offered in evidence. (App. 20.)

The Court of Appeals admitted in its discussion concerning admission of the statement that, "Undoubtedly, the jury was thus completely appraised of the comprehensive implication, by Milton and Vernell before the trial, of the appellants in the crime laid in the indictment" . . . and, "It is true that when the statements were bared to the jury the Court did not, on either occasion, give immediate ex-

planation to the jury of the limited effect they could give to the statement."

Having admitted that the statements were not limited by proper instructions, the Court's statement, "But we do not agree that this disclosure of the statements constituted reversible error." The opinion of the Court of Appeals was clearly in conflict with the law laid down by this Court in *Lutwak v. U. S., supra,* wherein it was said, "The Court must be careful **at the time of the admissions** and by its instructions to make it clear that the evidence must be **carefully and clearly limited by the Court at the time of their admissions,** and the jury instructed as to such declarations and the limitations put upon them." (Emphasis supplied.)

This Court in the *Lutwak case* did not stop after holding that the instructions must be given **at the time** of the admissions, but further stated that such statements must be "clearly and carefully limited" by instructions. It is easily seen that the two instructions given by the District Court (App. 20) were very definitely not such as would clearly and carefully limit the application of such evidence. Therefore the Court of Appeals in ruling that, "We believe that the Court's early observation to the parties of the presence of the jury, and its subsequent explicit directions to the jury, remedied its failure to give concomitant instructions as reference was made to this statement," was again clearly in conflict with the Law of the Land.

We must agree with Justice Jackson, who, in the case of *Krulewitch v. U. S., supra,* stated,

> "As a practical matter the accused is often confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even knew about, but which help persuade the jury of the existence of the conspiracy exists. The naive assumption that prejudicial effects can be over-

come by instructions to the jury—all lawyers know to be unmitigated fiction."

How then could the Court of Appeals state, "We find that the District Judge did warn the jury that the statements were not evidence against the appellants; and we think his admonitions were enough to avoid any prejudice to the appellants which the statements otherwise might impart to the jury," and not be in conflict with the law as set forth by this Court?

It is well to note at this point that while the Court of Appeals in the above-quoted portion of its opinion stated that they found that the District Judge did warn the jury that the statements were not evidence against the appellants, nowhere in its opinion have they (Court of Appeals) found that instructions were given at the publication of the statements to the jury by means of cross examination such as to satisfy the provisions set forth by this Court. Quite the contrary, the Court of Appeals held that such instructions were not given until quite some time later in the day.

It is also concluded that the Court of Appeals was in error when it stated that sufficient objections were not made concerning the introduction of the statement of Vernell Mack. Certainly Counsel for Petitioners put the Court on notice as to the exact objection being made when it was stated, "Your Honor, we would like to take the same position that Mr. Edens (another Defense counsel) took this morning as to the other statement to (of) Milton Mack, that this be confined to the same, strictly to Vernell Mack." It is difficult to see what words could have better expressed the position of the defense as to the introduction of Vernell's statement; a request that the Court limit the use of the statement to Vernell Mack.

As to the Court of Appeals' remarks that later request for limitation should have been made, it is rather hard to

do so with the Trial Judge, in open Court informs you when a proper objection is made, "You seem to be a little bit confused about the rules of evidence—That is elementary. Go ahead."

This statement is made of course with the realization that an attorney should possibly not let personal embarrassment stand in the way of his performing his duty to his client. However, it is readily admitted that after the remarks of the Trial Judge, attorney for petitioner was very much confused as to the rules of evidence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SENTENCE BY THE COURT

The COURT: Mr. Stanley, you are an experienced man in the field in which you have been convicted it would seem from your record. I don't know that anything that I can say to you would be any benefit to you or the public. You are mature, you know what you are doing when you do it. You are cognizant of course of the fact that you were violating the law because you had been caught for similar violations—that is as to the substantive offenses on a number of other occasions and sentenced by the Court. I am going to show you some leniency because of what has been said this morning in your behalf. It may be a forlorn hope but I do hope that when you finish with this that you have a disposition to do so and avail yourself of the opportunity of leading a law abiding, decent, respectable life. The sentence and judgment of the court is, on count one of the indictment, that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two and one-half years and that you pay a fine of five hundred dollars. On the remaining counts of the indictment, the sentence and judgment of the court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years, and that you pay a fine of two hundred dollars; these sentences to run consecutively that is to say that the sentence on counts two, three, four, five, and nine shall start after the expiration of the sentence on count one. Provided further that the sentence imposed herein upon counts two, three, four, nine and ten shall be suspended and as to that part of the sentence you will be on probation for a period of five years.

As to the defendant Worrell, on the first count of indictment, the sentence and judgment of the court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years and that you pay a fine of five hundred dollars. On the remaining counts of the indictment upon which you were convicted, that is counts two, three, and four, the sentence and judgment of the court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period

of eighteen months and that you pay a fine of two hundred dollars, the last sentence to commence to run at the expiration of the first. Provided, that the last sentence, that is the sentence for eighteen months on counts two, three, and four, shall be suspended and you are placed on probation for a period of five years.

Jackson, I don't think that you were the instigator of this thing. I think you were just one of the tools that were used by higher-ups. But I am also convinced that you were a willing tool. And judging by the way you ran that automobile and used that smoke screen, you were a dangerous one. However, I am going to give you credit for the fact that I don't believe that you were the instigator or one of the prime factors in this case. The sentence and judgment of the court as to you on count one is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen months and that you pay a fine of one hundred dollars, under count one. As to the remaining counts upon which you were convicted, counts two, three, four, and nine, the sentence and judgment of the court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen months and that you pay a fine of one hundred dollars, this sentence to commence at the expiration of the sentence imposed on count one but provided that this sentence shall stand suspended and you will be placed on probation for a period of four years. That is the second sentence, not the first.

OPINION BELOW

BRYAN, District Judge:

Leroy Stanley, Charlie Watts Worrell, Jr., and Ben Jackson, Jr., appeal from their convictions of a conspiracy [1] to violate, and of immediate violations of, the Internal Revenue laws relating to distilled spirits.[2] Named with them as a conspirator, but not charged with the conspiracy, was one Milton Mack; he was, however, a de-

[1] 18 U. S. C. A. 371; 26 U. S. C. A. (1939 Internal Revenue Code) 2803, 2810, 2821, 2833, 2913, 3115, 3116, 3253, and 3321.

[2] 26 U. S. C. A. (1939 Internal Revenue Code) 2803, 2913, 3321.

fendant in several counts of the common indictment for the same or similar individual offenses as were charged to the appellants. In the joint trial he was convicted, too, but he has not appealed. Nor are we concerned with the disposition of the case in respect to the two remaining defendants in the indictment.

To the judgment of conspiracy all three appellants assign the same and single error: that the court allowed post-conspiracy, written statements of Milton Mack and Vernell Mack, his son, which incriminated the appellants as well as Milton Mack, to be used in the impeachment of the declarants in cross examination and subsequently admitted the statements in evidence, without timely or adequate caution to the jury that the statements could be considered only against the declarants, respectively, and not against the appellants. Each appellant asserts, in addition, other errors in his conviction of the substantive offenses.

The statements had been given, before trial, to an investigator for the Alcohol and Tobacco Tax Unit after the cessation of the alleged conspiracy; they consisted of a narrative by Milton Mack of the participation of himself and the appellants in the plot, and an account by Vernell Mack of this observation of these activities. After proof of its execution and voluntary character, Milton's statement was proffered in evidence, unrestrictedly, as part of the Government's case in chief. Upon objection the Government limited its proffer as evidence against Milton only. At this point the court excluded the paper.

The court was of the opinion that while, obviously, the statement was admissible against Milton, it was clearly not competent evidence against any of the other defendants. Further, the court felt that, practically, the statement could not be confined to Milton because in it Milton's activities were inextricably interwoven with those of his co-defendants and complotters. The trial judge concluded that the appellants could not be adequately protected from the statement if it were read to the jury, even though the court should concurrently give appropriate admonitions to the jury. However, the agent who took the statement was per-

mitted to testify as to what Milton had told him about Milton's complicity in the offenses, omitting mention of the other defendants.

Vernell's statement, although its voluntariness had been *prima facie* proved, was not presented as a part of the prosecution's opening case. He was called, by the attorney for Milton Mack, as the first defense witness. On the stand he denied any involvement of his father in the whiskey offenses. Upon cross examination he admitted his signature to the statement but repudiated its contents, contending that it had been obtained through coercion and that he had not made the declarations embraced in it. Over the objection of the appellants, the United States Attorney in interrogating Vernell read the statement to him in full, at the end of each line asking the witness if he had so stated. Receipt of the statement in evidence was postponed by the court until it could hear again the testimony of those who had taken it.

On the following day, Milton Mack testified in his own defense. He, too, denied his alleged part in the crimes described in the indictment. On cross examination he acknowledged his signature to his statement but, like Vernell, disavowed its substance. The District Attorney questioned Milton as he had Vernell, reading his statement to him and inquiring with each line whether he had so informed the agent.

After the defense had rested, the United States recalled the investigator and he again vouched the fairness of the circumstances under which the statements were obtained. Thereupon the court admitted in evidence the earlier rejected statement of Milton Mack as well as the statement of Vernell Mack theretofore deferred.

Undoubtedly, the jury was thus completely apprised of the comprehensive implication, by Milton and Vernell before trial, of the appellants in the crimes laid in the indictment. But we do not agree that this disclosure of the statements constituted reversible error. We find that the District Judge did warn the jury that the statements were not evidence against the appellants; and we think his admonitions were enough to avoid any prejudice to the appellants

which the statements otherwise might have imparted to the jury.

That these declarations were binding only upon their respective subscribers—that they were not evidence against the appellants—is necessarily a concessum in this case. That for their impeaching properties they could be used in cross examination of Milton and Vernell, as witnesses, cannot be denied; *Walker v. U. S.*, 1939, 104 F. (2d) 465, 470; *Wheeler v. U. S.*, 1953, D. C., cir. 211 F. (2d) 19, 26; and that Milton's statement was, in addition, competent proof to the truth of his alleged criminal conduct, likewise is plain, for he was a defendant as well as a witness and this was his confession. These purposes entitled the statements to admission in evidence, notwithstanding that the other defendants were detrimentally mentioned in the statements. *Stein v. New York*, 1953, 346 U. S. 156, 194; Opper v. U. S., 1954, 348 U. S. 84, 95; *Robinson v. U. S.*, 1954, D. C., cir. 210 F. (2d) 29, 32. The only question now is whether the court properly circumscribed the evidential force and reach of the statements. The law required the trial court to do so by prudently counseling the jury against the danger of injury to the other defendants. *Lutwak v. U. S.*, 1952, 344 U. S. 604, 618. Looking at the whole trial we think the jury was sufficiently advised by the judge, and were well aware, that each statement was evidence only in respect to the person who made it.

It is true that when the statements were bared to the jury the court did not, on either occasion, give immediate explanation to the jury of the limited effect they could give to the statement. Accompanying advice on the point by the court was certainly desirable; it would have been a salutary measure. As will be pointed out, however, we believe that the court's earlier observations to the parties in the presence of the jury, and its subsequent explicit directions to the jury, remedied its failure to give concomitant instructions as reference was made to the statements.

Milton Mack's statement was initially mentioned in the case when its execution was proved through the investigator adduced by the Government in its opening. At that time the court made it quite clear to everyone that the statement was

not employable against any of the defendants save Milton. In other connections throughout the trial, the court called the attention of the jury to the rule, and necessity, of not considering statements against anyone save the author, except in prescribed circumstances. When Milton's statement was tendered in evidence, in the afternoon following the morning of its use in his cross examination, the same point was made by defense counsel and concurred in by the United States Attorney before the jury, and then twice explained to the jury by the court, in these words: "It is only evidence, gentlemen of the jury, against the party who made that statement, which is Milton Mack", and "It is evidence against him but not against any of the others." During the course of the charge the following request was made and granted:

> Counsel: "Your Honor, if the Court pleases, I request that you charge the jury that the statement put in evidence which was given by Milton Mack cannot be used as against the defendants Stanley, Jackson, and Worrell.
>
> "The Court: Any statement, gentlemen of the jury, made by any one of the defendants after the end of the conspiracy, if it was after the date of the alleged conspiracy, can not be considered against any other defendant. It can be considered only against him. * * *"

True, these express warnings of the court did not specifically include Vernell's statement; but there was never any objection by anyone, on the ground of its incrimination of others, to the admission of Vernell's statement in evidence. Moreover, Vernell's statement did not mention the appellants Worrell and Jackson and, therefore, only appellant Stanley can rely upon any error in its use. We think the jury was kept constantly mindful, through the reiteration of the principle by the court on Milton's statement and in other instances, that Vernell's extrajudicial utterances could be related to no one but Vernell.

Furthermore, the only request for a limiting caution in regard to Vernell's statement was offered just before its use on cross examination, when Stanley's attorney said, "Your honor, we would like to take the same position that

[another defense attorney] took this morning as to the other statement to [of] Milton Mack, that this be confined to the same, strictly to Vernell Mack." Though not acted upon, the request was never repeated, either during the examination or in a prayer to charge. If Stanley felt Vernell's statement had not been effectively immured, indisputably he had the right and duty, as well as the opportunity, to seek greater protection from the court, for the court had never evinced an unwillingness to afford such protection. Nor did the defense ever ask the court to tell the jury that Vernell's statement, even as to Vernell, was in no sense evidence of the truth of its contents, but only evidence of the factum of a prior inconsistent declaration. *Southern Ry. v. Gray,* 1916, 241 U. S. 333,337; *Barrett v. Virginia Ry. Co.,* 1917, 4 cir. 244 Fed. 397,400, rev. on other grounds 250 U. S. 473. Remiss in his duty, he cannot successfully impute error to the court for the omission of these warnings. *Troutman v. U. S.,* 1938, 10 cir. 100 F. (2d) 628, 634; *Wheeler v. U. S.,* 1954, D. C. cir. 211 F. (2d) 19, 26, note 17; *Cwach v. U. S.,* 1954, 8 cir. 212 F. (2d) 520, 526; *Davis v. U. S.,* 1956, 229 F. (2d) 181, 186. We hold appellant Stanley's failure to pursue his request in the trial court precludes his insistence upon it here.

Against their convictions on the substantive offenses the appellants urge the error we have just considered in regard to their conspiracy conviction. Again we find no merit in it. Additionally, the appellants assign other errors peculiar to their respective individual cases; upon examination of them we are satisfied they are insubstantial.

Affirmed.

OBJECTIONS BY COUNSEL FOR PETITIONERS TO READING OF STATEMENT OF VERNEL MACK

Mr. REAGAN: Your Honor, we would like to take the same position that Mr. Edens took this morning as to the other statement to Milton Mack, that this be confined to the same, strictly to Vernell Mack.

The COURT: This man is on the witness stand now testifying first handed.

Mr. BELSER: That is right.

The COURT: It is offered in behalf of the defendant. He is subject to cross examination if he has made prior statements that are contradictory of what he has now testified that may now be introduced.

OBJECTIONS BY COUNSEL FOR PETITIONERS TO READING OF STATEMENT OF MILTON MACK

Mr. BERRY: Your Honor, we object to the District Attorney proceeding to read this statement, because Your Honor has previously ruled that the statement was not admissible as evidence. He is simply trying to do one way something the Court has directed * * *

The COURT: You seem to be a little bit confused about the rules of evidence.

Mr. BERRY: Your Honor, this is a statement * * *

The COURT: Well now, are you going to let me talk or not?

Mr. BERRY: Yes, sir.

The COURT: It is one thing to offer a statement of a person who is not on the witness stand. It is another thing to examine that person when he is on the witness stand about a statement he has made previously—an entirely different situation. It no longer becomes hearsay when he is there on the stand himself and he is asked about some statement he made, of course. That is elementary. Go ahead.

REQUEST FOR CHARGE BY MR. BERRY

Mr. BERRY: Your Honor, if the Court pleases, I request that you charge the jury that the statement put in evidence which was given by Milton Mack cannot be used as against the defendants Stanley, Jackson and Worrell.

The COURT: Any statement, gentlemen of the jury, made by any one of the defendants after the end of the conspiracy, if it was after the date of the alleged conspiracy, can not be considered against any other defendant. It can be considered only against him. But any statement that he may have made during the course of the conspiracy and in furtherance of it can be used, if any such exists. I don't recall whether there is any such as that or not. But, any way, no statement that he made after, after September, 1953 could be used against anybody except himself.

* * *

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 614

LEROY STANLEY, CHARLIE WATTS WORRELL, JR., AND BEN JACKSON, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 14-19; R. 213-220) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1956 (R. 221). The petition for a writ of certiorari was filed on December 7, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether post-conspiracy written statements of a co-defendant and his son, which were used in impeachment

of the declarants when they testified as defense witnesses, were properly limited by the court's instructions as evidence only against the declarants and not against petitioners who were implicated by the statements.

STATEMENT

Petitioners Stanley, Worrell, and Jackson were found guilty in a jury trial in the United States District Court for the Eastern District of South Carolina of a conspiracy to violate, and substantive violations of, the Internal Revenue laws relating to distilled spirits (R. 209). Stanley was sentenced to imprisonment for 2½ years and a $500.00 fine on count 1 for conspiracy, and to two years' imprisonment and a fine of $200.00 on counts 2, 3, 4, 9, and 10, to run consecutively, with the sentences on these counts suspended and Stanley placed on probation for five years (R. 209). Worrell was sentenced to imprisonment for two years and a $500.00 fine on count 1, and to 18 months' imprisonment and a $200.00 fine on counts 2, 3, and 4, to commence at expiration of the sentence on count 1, with the sentences on these counts suspended and Worrell placed on probation for five years (R. 210). Jackson was sentenced to imprisonment for 15 months and a $100.00 fine on count 1, and to 15 months' imprisonment and a $100.00 fine on counts 2, 3, 4, and 9, to commence at the expiration of the sentence on count 1, with the sentences on these counts suspended and Jackson placed on probation for four years (R. 210). The three petitioners appealed (R. 205-208), and their convictions were unanimously affirmed (R. 221).

Pertinent evidence adduced at the trial may be summarized as follows:

On December 21, 1953, after the termination of the alleged conspiracy in January 1953, Milton Mack, who was named in the indictment in several substantive offenses with petitioners as a conspirator (although not charged with the conspiracy), executed a signed sworn statement (Gov. Ex. 3) before two government investigators (R. 184-187). This statement implicated petitioners Stanley and Worrell with storing bootleg whiskey at Mack's farmhouse, and petitioner Jackson with unloading such whiskey there (R. 184-187).

Vernell Mack, Milton's son, executed a signed sworn statement dated February 10, 1954 [1] (Gov. Ex. 2), before two government investigators. The substance of this statement was that Vernell had observed his father and petitioner Stanley on various occasions using the farmhouse as a place to store bootleg whiskey (R. 181-184).

There was evidence to the effect that, prior to the trial, Stanley and Worrell induced the Macks to repudiate their signed sworn statements (R. 199, 202). As a result of such repudiation, neither of the Macks testified for the government.

In the prosecution's case in chief, after proof of the voluntary execution of Milton Mack's statement, the government offered it in evidence (R. 4). Counsel for Worrell objected to showing the statement to the jury on the ground that references in it to any defendants other

---

[1] This statement is also dated January 11, 1954 (R. 184), as the time of the oath. Probably this should read February 11, 1954, but the discrepancy in dates is of no importance so far as the case is concerned.

than Mack would be inadmissible since the statement was taken after termination of the conspiracy. The court excluded the statement from evidence, but permitted its use, without mention of petitioners' names, to refresh the government agent's memory as to what defendant Mack had told him about his personal part in the case (R. 6-7).

On cross-examination of Vernell Mack as a defense witness, the government offered his statement (Gov. Ex. 2) in evidence (R. 59-60). The following occurred (R. 60, 187):

> Mr. Reagan [Stanley's counsel]: Your Honor, we would like to take the same position that Mr. Edens [Worrell's counsel] took this morning as to the other statement to [of] Milton Mack, that this be confined to the same, strictly to Vernell Mack.
>
> * * * * *
>
> The Court: It is offered in behalf of the defendant. He is subject to cross-examination if he has made prior statements that are contradictory of what he has now testified that may now be introduced.

Vernell was then asked in a series of questions whether he had given the information in his statement. He admitted his signature but repudiated the statement (R. 60-65). Upon objection of counsel for Milton Mack, the court postponed receipt in evidence of Vernell's statement until it could hear testimony of those who had taken it (R. 65-66).

The following day, Milton Mack testified as a defense witness on his own behalf (R. 7). On cross-examina-

tion, he admitted that he had signed his statement (Gov. Ex. 3), but said he had been afraid and had done so at the inducement of government officials in order to keep out of jail (R. 31-32). When government counsel started to read from Milton's statement in cross-examination, counsel for Jackson objected (R. 34, 190-191):

> Mr. Berry: Your Honor, we object to the District Attorney proceeding to read this statement, because Your Honor has previously ruled that the statement was not admissible as evidence. He is simply trying to do one way something that the Court has directed * * *.
>
> The Court: You seem to be a little bit confused about the rules of evidence. * * * It is one thing to offer a statement of a person who is not on the witness stand. It is another thing to examine that person when he is on the witness stand about a statement he has made previously—an entirely different situation. It no longer becomes hearsay when he is there on the stand himself and he is asked about some statement he made, of course. That is elementary. Go ahead.

The government attorney then read the statement, inquiring after each line whether Milton Mack had so informed the agent. In repudiating the statement, Milton denied his alleged part in the crimes (R. 35, 39-43).

After the defense had rested, the government recalled its investigator who again testified as to the fairness of the circumstances under which the statements were taken (Pet. App. 16). Thereafter, Vernell's statement was introduced in evidence "for what it is worth," over objection by counsel for Milton Mack that because

of Vernell's illiteracy he could not tell whether the statement introduced was his (R. 191-192). Milton's statement was admitted into evidence under the following circumstances (R. 192-193):

> Mr. Belser [government attorney]: Your Honor, I offer in evidence this paper (statement of Wilton [sic] Mack) which was previously marked for identification G-3.
>
> Mr. Berry [Jackson's counsel]: Your Honor, if the Court pleases, we object to that being admitted against the other defendants. That statement was made after the alleged conspiracy had ended. We, therefore, contend that it is not admissable [sic] as against the other defendants.
>
> The Court: It is not evidence against the other defendants.
>
> Mr. Belser: I am perfectly willing to have Your Honor instruct the jury to that effect.
>
> The Court: It is only evidence, gentlemen of the jury, against the party who made that statement, which is Milton Mack. * * * It is evidence against him but not against any of the others.

During the course of the court's charge, petitioner Stanley admitted guilt on counts 9 and 10 and petitioner Jackson admitted guilt on count 10 (R. 193-194).[2] Counsel for Jackson requested the court to charge that Milton Mack's statement could not be used against pe-

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[2] In asking that he be put on probation after conviction, petitioner Worrell stated, "I don't say, Your Honor, that the jury didn't find a just verdict as far as I am concerned. * * *" (R. 203).

titioners Stanley, Jackson, and Worrell, and the court complied, using this language (R. 194):

> Any statements, gentlemen of the jury, made by any one of the defendants after the end of the conspiracy, if it was after the date of the alleged conspiracy, cannot be considered against any other defendant. It can be considered only against him. * * *

ARGUMENT

Contrary to petitioner's contention, the post-conspiracy written statements of defendant Milton Mack and of his son, Vernell, were properly limited by the court's instructions throughout the entire trial. In the total setting of the case the jury must have understood that these statements could be considered only as against the declarants and not against the petitioners.

1. *Milton Mack's statement*—Tantamount to a confession, this statement principally incriminated petitioners Stanley and Worrell, and also mentioned petitioner Jackson (R. 184-187). When it was first referred to in the government's case in chief, the court excluded it from evidence on the ground that even a limiting instruction would not have protected petitioners since Mack's activities were so closely interwoven with theirs. Even at this early stage of the trial, the court made clear to the jury that Mack's statement could be considered as evidence against him alone (R. 5-7).

After Mack affirmatively took the stand for the defense, however, the statement could properly be utilized for impeachment purposes. *Cf. C., M. and St. P. Railway* v. *Artery*, 137 U.S. 507, 519-520; *Wheeler* v. *United States*, 211 F. 2d 19, 25-26 (C.A. D.C.), certiorari denied, 347 U.S. 1019; *Weiss* v. *United States*, 122 F. 2d

675, 688 (C.A. 5), certiorari denied, 314 U.S. 687; *Walker* v. *United States*, 104 F. 2d 465, 470 (C.A. 4). When the statement was finally admitted in evidence over defense objection, the court unequivocably instructed that "It is not evidence against the other defendants," and "It is only evidence * * * against the party who made that statement, which is Milton Mack" (R. 192, 193). And in its final charge, in response to a request for a similar instruction, the court said, "Any statement * * * made by any one of the defendants after the end of the conspiracy, if it was after the date of the alleged conspiracy, cannot be considered against any other defendant. It can be considered only against him" (R. 194).

Just as a court's final charge to the jury must be read in its entirety (*Boyd* v. *United States*, 271 U.S. 104, 107), so, in answering the question whether the jury was adequately apprised of the precept that Mack's statement could be used only against him, the entire record, including all of the court's instructions and remarks, must be scrutinized. When this is done, it is clear that the jury must have understood the legal principle involved. See *Opper* v. *United States*, 348 U.S. 84, 94-95; *United States* v. *Delli Paoli*, 229 F. 2d 319, 322 (C.A. 2), pending on writ of certiorari, No. 33, this term.

The decision below is not at variance with *Lutwak* v. *United States*, 344 U.S. 604 (see Pet. 5-7). Both rulings recognize the principle that post-conspiracy declarations made in the absence of a co-conspirator are inadmissible unless the court, by its instructions, makes it clear that the evidence is to be limited against the declarant only. The passages quoted by the petitioner from *Lut-*

wak (Pet. 6, 7) do not hold that the court must in every case, regardless of the circumstances, give an explicit limiting instruction immediately upon mention of the declarant's statement, even prior to its admission in evidence. The proper criterion established by that case is simply that the caution must be adequate in the circumstances. That standard was met in the instant case, as we have pointed out.

Nor do we believe that the disposition of this case need await the outcome of the pending *Delli Paoli* case, No. 33, this Term. The particular circumstances of the two cases are significantly different, and unless the Court were to hold in No. 33 that a statement by a co-conspirator implicating other defendants is never admissible—no matter how full the limiting instructions—the result in No. 33 would not be directly pertinent here. And petitioners, unlike *Delli Paoli*, do not make that broad claim, but urge only that the particular admonitions given in their case were not in fact adequate.

2. *Vernell Mack's statement*—This was less important than Milton Mack's statement since Vernell was not a defendant and his statement incriminated only Stanley of the three petitioners. When Vernell's statement was first mentioned on his cross-examination, Stanley's counsel requested that it be confined strictly to Vernell, in line with the same objection that Worrell's counsel had made to Milton Mack's statement. This request was not acted upon at that time, but the court did properly rule that, for impeachment purposes, if Vernell "has made prior statements that are contradictory of what he has now testified that may now be introduced" (R. 60, 187). When Vernell's statement was finally admitted

in evidence, the objection urged was his illiteracy, and the objection that the statement could be related to no one but him was not repeated (R. 191-192). Neither was a request for such an instruction made at the time of the court's final charge (R. 194).

In these circumstances, it is submitted that the court below was correct in ruling that "[I]f Stanley felt Vernell's statement had not been effectively immured, indisputably he had the right and duty as well as the opportunity, to seek greater protection from the court, for the court had never evinced an unwillingness to afford such protection" (Pet. App. 19). When a party might have had all that he was entitled to in the way of instructions from the trial court, he is in no position to complain of the court's instructions to which no exception was taken. *Cf. Pennsylvania Railroad Co.* v. *Minds,* 250 U.S. 368, 375; *Troutman* v. *United States,* 100 F. 2d 628, 634 (C.A. 10); *Cwach* v. *United States,* 212 F. 2d 520, 526 (C.A. 8). Moreover, because of the court's numerous admonitions that Milton Mack's statement as a conspirator could be used only against him alone and not against petitioners, it is highly unlikely that the jury adopted a contrary rule regarding Vernell's implication of petitioner Stanley.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 614

LEROY STANLEY, CHARLES WATTS WORRELL, JR., AND BEN JACKSON, JR., PETITIONERS,

versus

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR A STAY OF THE MANDATE

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MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND FOR A STAY OF THE MANDATE

The petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case entered on February 25, 1957, and for a stay of the issuance of the mandate.

Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, this Court has, since

the filing of the petition for a writ of certiorari, filed its decision in *Paoli v. United States,* 77 S. Ct. 294, which is in conflict with the holding of the United States Court of Appeals for the Fourth Circuit in affirming the judgment of the District Court.

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Attorney for Petitioners.

PETITION

The petitioners pray that this Court grant rehearing of its order of February 25, 1957, denying the petition for writ of certiorari, 77 S. Ct. ...., and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed December 7, 1956, herein.

REASONS FOR GRANTING REHEARING AND GRANTING A WRIT

1. Since the filing of the petition for a writ of certiorari, this Court has delivered its opinion in the case of *Paoli v. United States,* 77 S. Ct. 294, the decision therein is in conflict with the decision of the Court of Appeals for the Fourth Circuit herein which affirms the judgment of the District Court.

In the *Paoli case,* as in the present case, the question raised concerned the admission into evidence of the statement of a conspirator made long after the termination of the alleged conspiracy, when such statement strongly implicated the petitioners. The one difference in the *Paoli case* and the present case is that in the present case a statement made by a party not a member of the conspiracy but which strongly implicates the petitioners, was admitted into evidence.

It is not contended by the petitioners that the statement of the alleged co-conspirator was inadmissible but rather the trial Judge must, **at the time,** the statement is admitted, clearly stated to the jury that the statement is to be considered only in determining the guilt of the declarent and not that of the co-defendants to whom it refers, and that the failure of the trial Judge to do so, constitutes reversible error.

It is likewise not contended that the statement of the party, not a member of the alleged conspiracy, was inadmissible, but rather that it was admissible only to impeach the testimony of the declarent and that the trial Judge should, **at the time** the statement was admitted, clearly state to the jury that the same was not to be considered by them in determining the guilt of the petitioners but only to contradict and impeach the testimony of the declarent.

The prosecution, prior to the formal introduction of both statements into evidence, bared them to the jury by reading them, line for line, in cross examination of the declarents. Upon objection by counsel for petitioners, the trial Judge overruled the objections and permitted the prosecution to proceed with the reading of the implicating statements to the jury without instructions as to the use and limitations of the statements.

Certainly it cannot be said that the baring of the statements to the jury is not tantamount to admission of the same insofar as the jury is concerned, they have heard all of the statements and what they concerned. The statements were in fact formally admitted into evidence quite some time after the jury first heard them.

The Court of Appeals admitted in its decision that, "Undoubtedly, the jury was thus completely appraised of the comprehensive implications, by Vernell and Milton before the trial, of the appellants in the crime laid in the

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indictment" * * * and later, "It is true that when the statements were bared to the jury the Court **did not, on either occasion, give immediate explanation to the jury of the limited effect they could give the statement.**" (Emphasis supplied.)

Having admitted that the statements were not limited by proper instruction, the Court of Appeals then stated, "But we do not agree that this disclosure of the statement (without proper instructions to the jury) constituted reversible error."

Certainly this view of the Court of Appeals conflicts with the decision of this Court in the *Paoli case* which stated, "These declarations (*i. e.*, those admissible only as to the declarent) must be carefully and clearly limited by the Court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them."

The trial Court, when the co-conspirator's statement was formally offered into evidence late in the afternoon following the morning use of the statement for cross examination, said that the statement was in use as against the declarent only and also, after request by counsel for petitioners, charged the jury as to the use of the statement. Both instructions to the jury were short and in the light of the baring of the statement to the jury prior to its formal introduction, not very clear.

This Court stated in the *Paoli case* that, "Even then (after clear instructions to the jury at the time of the admission or baring of the statement) in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admissions of certain declarations and to whom they have been limited and in some instances for what purpose."

In the case at hand there were five defendants. There were two statements which were read to the jury. At the time they were read, the jury heard the trial Judge overrule the defense counsel's objections. Later the two statements were admitted into evidence and one of the statements was limited by a very general and short instruction to the jury.

The case at hand does not meet the test of requiring clear instructions which limit the effect of such statements.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that the issuance of the mandate be stayed and that the rehearing be granted and that, upon such rehearing a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Attorney for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

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